

UNITED STATES COPYRIGHT ROYALTY JUDGES

The Library of Congress

In re

**DISTRIBUTION OF 2004, 2005, 2006, 2007,
2008, and 2009 Cable Royalty Funds**

**DOCKET NO. 2012-6 CRB CD
2004-09 (Phase II)**

In re

**DISTRIBUTION OF 1999, 2000, 2001, 2002,
2003, 2004, 2005, 2006, 2007, 2008, and 2009
Satellite Royalty Funds**

**DOCKET NO. 2012-7 CRB SD
1999-2009 (Phase II)**

**ORDER GRANTING IN PART AND DENYING IN PART
SDC'S MOTION TO COMPEL IPG TO PRODUCE DOCUMENTS**

I. Introduction

On October 17, 2016, the Settling Devotional Claimants (SDC) filed a Motion seeking to compel Independent Producers Group (IPG) to produce documents responsive to follow-up requests served by the SDC. On October 24, 2017, IPG filed its Opposition. On October 28, 2017, the SDC filed its Reply. For the reasons stated in this Order, the Judges grant in part and deny in part the SDC's Motion.

As summarized by the SDC, they seek documents that constitute "communications that are expected to explain why IPG's expert, Dr. [Charles] Cowan, made multiple rounds of material changes to his calculations of the proposed satellite royalty shares for each year in both the Devotional and Program Suppliers categories." Motion at 1. The SDC anticipate that the documents they seek will shed light on Dr. Cowan's "highly significant, but unexplained change from a level-linear to a log-linear regression model." *Id.* at 1-2.

In IPG's responses to the SDC's original document requests (*i.e.*, before the follow-up requests that are the subject of this Motion), IPG stated that Dr. Cowan had not "preserve[d] the data files showing how he arrived at his amended results." *Id.* at 2. Accordingly, in the follow-up requests, the SDC sought the specific documents. The SDC asked for communications between Dr. Cowan and Denise Vernon of IPG or anyone else at IPG (including Raul Galaz); Dr. Cowan and counsel for IPG; Ms. Vernon and Navigant Consulting (Navigant); Dr. Laura Robinson and Navigant; and Jeff West or Dr. Robinson,¹ concerning (1) Dr. Cowan's original, August 22, 2016, Expert Report ("Cowan Report"), (2) changes between the Cowan Report and

¹ Dr. Robinson is another expert witness for IPG in this proceeding and a Managing Director at Navigant, an international economics consulting firm. Jeff West is an Associate Director for Navigant who assisted Dr. Robinson in her work on behalf of IPG.

his August 31, 2016 Amended Report (Amended Report), and (3) the Amended Report and Dr. Cowan's September 25, 2016 Affidavit with additional changes to the satellite shares (Cowan Affidavit). Motion, Ex. A (Follow-Up Requests No. 4-9, 13-20).

Also, the SDC cast a wider net in an effort to capture what they claim are all additional communications that might include the desired information. Specifically, the SDC also sought communications to or from Navigant about formulas or data underlying Mr. Cowan's initial report, Amended Report, or the Cowan Affidavit (Follow-Up Request No. 21); to or from Dr. Cowan concerning the SDC's August 26, 2016, Notice of Consent to 1999-2009 Satellite Shares Proposed by IPG, and Motion for Entry of Distribution Order (Follow-Up Request No. 24); between Dr. Cowan and anyone at Analytic Focus LLC (where Dr. Cowan is a managing partner) or anyone working under Dr. Cowan's direction, concerning errors or corrections to the Cowan Report, Amended Report, or the Cowan Affidavit (Follow-Up Request No. 25); and any communications regarding the discovery of errors that led to the filing of IPG's Amended Direct Statement (Follow-Up Request No. 23). *Id.* at 2-3.

IPG objected to these requests, asserting basically that: (1) Dr. Cowan "did not save interim data [he] created and discarded as [he] made his corrections;" (2) documents requested regarding communications in which IPG's counsel participated are properly withheld pursuant to the attorney-client privilege;² and (3) all other documents are properly withheld pursuant to the work product rule.³ Opposition at 1-2.

The SDC argue essentially that: (1) IPG must produce the data Dr. Cowan states that he did not save, if they are included in communications otherwise subject to the work product rule; and (2) even though requested "communications involving a party and its experts and counsel are generally not discoverable," they are discoverable in this instance because SDC has "a 'substantial need' for the materials" *Id.* at 3.⁴

² Section 351.6 of the Judges' procedural rules limits discovery to "nonprivileged underlying documents" 37 C.F.R. §351.6.

³ The Judges are not bound by the *Federal Rules of Civil Procedure*, but look to them for guidance on a case-by-case basis, as appropriate. The work product rule, *Fed. R. Civ. P.* 26(b)(3), is essentially a codification of a Supreme Court decision (*Hickman v. Taylor*, 329 U.S. 495 (1947)) and the Judges have consistently applied this rule in their proceedings. The work product rule provides that

a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, ... those materials may be discovered if: (i) they are otherwise discoverable ... and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Id.

⁴ IPG also claims that "communications between IPG's counsel and IPG and Dr. Cowan are ... protected by the attorney-client privilege. Opposition at 6. However, as SDC notes, its "requests do not seek communication between IPG and its counsel." Reply at 5. Thus, the attorney-client privilege is not implicated by this Motion.

II. Analysis

A. IPG Must Produce Any and All Portions of Documents that Contain the Interim Data, Calculations, and Explanations Dr. Cowan Says He Overwrote

The data and calculations sought by the SDC are clearly discoverable. Pursuant to 37 C.F.R. § 351.10(e), “[i]f studies or analyses are offered in evidence ... [t]he facts and judgments upon which conclusions are based shall be stated *clearly, together with any alternative courses of action considered.*” *Id.* (emphasis added). It is self-evident that Dr. Cowan had previously considered (whether intentionally or erroneously) a course of action that included a level-linear regression with regard to satellite shares (in his original report) before changing his “course of action” and switching to a log-linear regression. By their original and follow-up discovery requests, the SDC legitimately have sought to be forearmed with facts that they might use to challenge Dr. Cowan’s “alternate” course of action that he corrected in his Amended Report.

IPG does not set forth any reason why it should not be required to produce documents that contain the underlying data Dr. Cowan utilized and calculations he made to prepare his original report, revise that report, and prepare his Amended Report regarding his satellite results. Rather, IPG, and Dr. Cowan, state that the requested data and calculations do not exist because Dr. Cowan “overwrote” and “did not save” that information, and that information thus has been “discarded” and does not exist. Opposition at 2; Motion at 4 and Ex. C thereto (email from IPG’s counsel). If that were the end of the matter, IPG’s position would be dispositive, because it is a fundamental principle of discovery, applied in these proceedings, that a party is not required to produce documents that do not exist.⁵ See *IPG v. Librarian of Congress*, 792 F.3d 132, 138 (D.C. Cir. 2015) (a party may respond sufficiently to a document request by stating that no responsive documents exist).

However, the SDC have sought other documents, described above, that may contain (or describe) some or all of the data on which Dr. Cowan relied, as well as the calculations he made. In that regard, the Judges note that Dr. Cowan did not provide a statement under oath declaring that the requested data and calculations were irretrievable. In any event, the mere fact that Dr. Cowan or anyone else on behalf of IPG, *including its attorneys*, may have included such clearly discoverable data and calculations (or descriptions of same) in documents that are otherwise protected pursuant to the work product rule does not permit the responding party to withhold that requested material. See *F.T.C. v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 152 (D.C. Cir. 2015) (“[W]here a document contains both opinion and fact work product, the court must examine whether the factual matter may be disclosed without revealing the attorney’s opinions.”).

It is also a fundamental principle that an attorney cannot transform otherwise discoverable facts into protected work product merely by choosing to write those facts down. *In re Sealed Case*, 124 F.3d 230, 236-37 (D.C. Cir. 1997), *rev’d on other grounds sub nom. Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998). *A fortiori*, neither IPG nor its attorneys could convert the requested materials prepared by Dr. Cowan into protected work product by duplicating or reproducing those facts in communications with counsel.

⁵ If the propounding party can demonstrate spoliation of the non-existent documents, such wrongful activity would merit separate consideration, but SDC does not assert that Dr. Cowan intentionally overwrote the requested data and calculations to destroy discoverable material.

Further, the Judges find that the SDC indeed have a “substantial need” for these materials that is sufficient to overcome the work product rule, even assuming *arguendo* that rule were to apply in this instance. Applying the standard for a showing of “substantial need” established by the D.C. Circuit, the Judges find that Dr. Cowan’s interim data and calculations are discoverable because they are: (1) relevant pursuant to 37 C.F.R. § 351.10(e); (2) have “a unique value” apart from the material already in the SDC’s possession; and (3) “special circumstances” exist because Dr. Cowan claims to have effectively erased his original version of his data and calculations. *See Boehringer*, 778 F.3d at 155.⁶

In making these discovery disclosures, for the reasons stated in subsections B and C, *infra*, IPG may redact any and all other contents that IPG claims to be subject to withholding pursuant to the work product rule or the attorney-client privilege. *See U.S. v. Deloitte, LLP*, 610 F.3d 129, 139 (D.C. Cir. 2012) (permitting redacted production to protect otherwise privileged material). However, IPG must prepare an index of the documents withheld in their entirety or partially (to the extent it has not already done so), so that the SDC have sufficient information necessary to challenge any claim of privilege, should they choose to do so. At a minimum, this index should identify, itemized for each document withheld in whole or in redacted part: (1) the senders and recipients; (2) the subject matters discussed; (3) the dates of transmission and receipt; and (4) the legal basis for non-production.

B. The SDC are Not Entitled to Discovery of any other Documents Responsive to its Follow-Up Requests

To the extent the SDC’s Motion could be read broadly⁷ as seeking “opinion work product,” the Judges note that this category of information is “virtually undiscoverable.” *Dir., Office of Thrift Supervision, v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997). If the SDC intended to obtain “opinion work product,” they have not provided a sufficient basis to overcome the virtually absolute protection afforded such material. To that extent, the Judges deny the SDC’s Motion.

C. The SDC are Not Entitled to Discovery of Communications to or from Raul Galaz other than Communications that Contain Dr. Cowan’s Interim Data or Calculations, or Explain why Dr. Cowan amended his Original Report

The SDC seek unredacted responses from IPG regarding communications to and from Raul Galaz that have been sought in the SDC’s follow-up requests. However, IPG asserts that Mr. Galaz is a consultant to IPG and therefore his communications are separately protectable under the work product rule. Mr. Galaz was the founder of IPG. He has also been an IPG employee, but he now eschews that role, and IPG claims instead that he is a consultant to the company. *See Declaration of Denise Vernon* ¶ 3 (October 21, 2016).

⁶ The “undue hardship” prong of the test is also satisfied, because there is no other manner by which the SDC could obtain Dr. Cowan’s data, calculations and reasons for amending his report.

⁷ The Judges understand that the SDC’s follow-up requests were wide-ranging because of their intention to capture all documents that might contain Dr. Cowan’s data, calculations and reasons for amending his report.

The SDC acknowledge that if Mr. Galaz is a *bona fide* consultant, then the follow up requests for documents containing communications to or from him are subject to work product protection. Motion at 7. However, finding Ms. Vernon's Declaration insufficient, the SDC asked for proof of Mr. Galaz's consultancy in the form of a written agreement. IPG claims that Mr. Galaz has only an oral consulting agreement. The SDC argue that, absent additional facts, such as documentation of Mr. Galaz's consultancy, IPG cannot claim him as a consultant whose communications are protected by the work product rule.

The Judges reject the SDC's argument. The SDC do not point to any authority that requires a written consulting agreement in order for a putative consultant to be covered by the attorney work product rule. The only case on which the SDC rely held that documentary evidence in the form of an email was *sufficient* to confirm the consulting relationship, but that case does not suggest that documentary evidence is *necessary*, nor does that case set forth any standard for determining whether a person is a consultant whose communications are protected under the work product rule. *See Yeda Research & Dev. Co. v. Abbott GmbH & Co. KG*, 292 F.R.D. 97, 111 (D.D.C. 2013).

Ms. Vernon, as a member of IPG (formally, a limited liability company Worldwide Subsidy Group dba IPG) has represented that Mr. Galaz is a consultant. The Judges do not require additional support for this assertion. Moreover, Mr. Galaz is regularly front-and-center as IPG's principal fact witness in cable and satellite distribution proceedings. Indeed, Mr. Galaz provided testimony in this proceeding as not only an "employee" of IPG, but also as an "authorized representative" of IPG. *Testimony of Raul Galaz* at 1 (July 8, 2014). Thus, his relationship appears to be tantamount to a consultancy.

Moreover, the Judges continue to attribute Mr. Galaz's past misconduct to IPG in these distribution proceedings by withholding a "presumption of validity" as to its representations of claims and claimants. *See, e.g. In re Distribution of 1998 and 199 Cable Royalty Funds, Docket No. 2008-1, Ruling and Order Regarding Claims at 7-11* (June 18, 2014). Clearly, there remains a sufficient connection between IPG and Mr. Galaz "showing that Mr. Galaz is in fact an agent of IPG authorized to act on its behalf for purposes of litigation," Reply at 5, thereby establishing Mr. Galaz's communications as work product.

Therefore, Mr. Galaz's communications with IPG and its counsel are protected pursuant to the work product rule. In their Motion, the SDC have not explained why they need all documents that relate to such communications, and to that extent the SDC's Motion is denied. *However*, to be clear and consistent, the Judges require Mr. Galaz to turn over to IPG, for disclosure to the SDC, any documents in his possession that set forth or contain Dr. Cowan's interim data and calculation that he claims to have overwritten, and that set forth or describe Dr. Cowan's explanation for amending his original report.

III. Conclusion and Order

For the reasons stated herein, SDC's Motion is **GRANTED IN PART AND DENIED IN PART**.

The Judges **ORDER** IPG to produce to the SDC, within ten business days of this Order, and consistent therewith, any and all portions of documents that fall within the SDC's follow-up requests that contain or describe Dr. Cowan's interim data and calculations on which he relied to correct his original report and to create his Amended Report. Further, the Judges order IPG to produce from within those documents any and all portions that explain why Dr. Cowan made corrections to his original report and incorporated those corrections into his Amended Report.

SO ORDERED.



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David R. Strickler
Copyright Royalty Judge

Dated: January 3, 2017